No. 239

Supreme Court, U.S.
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No. 7366

In the United States Court of Appeals for the Fourth Circuit

JOSEPH N. ROMM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF AND APPENDIX FOR THE RESPONDENT

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PREVIOUS OPINIONS

The memorandum findings of fact and opinion of the Tax Court rendered after the hearing on the merits are not officially reported. The opinion of this Court modifying the Tax Court opinion is reported at 245 F. 2d 730, certiorari denied, 355 U. S. 862. The subsequent order and decision of the Tax Court (R. 12a–13a)[1] entered in order to carry out the mandate of this Court are not officially reported.

JURISDICTION

This appeal, involving an order and decision of the Tax Court conforming its previous decision to the judgment and mandate of this Court, is taken from

[1] Record references are to the Appendix to taxpayer's brief.

the order and decision of the Tax Court entered December 17, 1957. (R. 1, 12–13.) Petition for review was filed on January 15, 1958. (R. 13–14; Appendix, *infra*.) The jurisdiction of this Court is invoked under Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Did the order and decision of the Tax Court, in modifying its earlier decision, correctly carry out the mandate of this Court?

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1954:

SEC. 7482. COURTS OF REVIEW.

(a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * * *

(c) *Powers.*—

(1) *To affirm, modify, or reverse.*—Upon such review, such courts shall have power to affirm or, if the decisions of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or

without remanding the case for a rehearing, as justice may require.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7482.)

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes generally.*—

(1) [As amended by Sec. 202, Revenue Act of 1941, c. 412, 55 Stat. 687] *Allowances in general.*—Taxes paid or accrued within the taxable year, except—

(A) Federal income taxes:

* * * * *

(26 U. S. C., 1952 ed., Sec. 23.)

Rules of Practice of the Tax Court of the United States (Revised January 1957):

Rule 50. *Computations by parties for entry of decision.*—(a) *Agreed computations.*—Where the Court has filed its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and two copies of a computation show-

ing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

* * * * *

(c) *Limits on argument under this Rule.*— Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for retrial or reconsideration.

STATEMENT

This Court issued a mandate to the Tax Court remanding this case for further proceedings not inconsistent with the opinion of this Court. (R. 1.) In the opinion of this Court the lower court's decision was modified, as follows (*Romm* v. *Commissioner*, 245 F. 2d 730, 736 (C. A. 4th), certiorari denied, 355 U. S. 862):

> The case is remanded to the Tax Court for modification of the order as to interest on the deficiency and as to the liability of taxpayer's wife. In all other respects, the decision is affirmed.

The Commissioner in the Tax Court and in this Court conceded that the wife was not liable; she was found jointly liable for the husband's deficiencies through an inadvertant error. The interest on the deficiency

related to a payment made by taxpayer on his 1946 deficiency. By allocating this amount to the deficiency rather than the fraud penalty interest would stop running on the $831.24. *Romm* v. *Commissioner*, *supra*, pp. 732, 736. The Tax Court followed the mandate of this Court and ordered the deficiencies in income tax and additions to the tax in the following amounts (R. 13):

Year	Income tax	Additions to tax
1942	$2,159.56	$1,079.78
1943	2,145.22	1,072.61
1944	15,745.65	7,872.83
1945	16,853.67	8,426.84
1946	3,613.85	12,987.27

The original tax deficiency and additions to tax were determined by a Tax Court Rule 50 computation. This occurred on July 24, 1956, when subsequent to the opinion of the Tax Court, the taxpayer and the Commissioner filed an agreed computation of the tax. (R. 12.)

After the rendition of this Court's mandate taxpayer filed a motion for entry of decision based upon Tax Court Rule 50 computations. (R. 4–11.) The Tax Court rejected this computation stating that taxpayer was seeking "a new Rule 50 computation based upon an argument which raises new issues." (R. 12.) Taxpayer has now petitioned this Court for review of the decision of the Tax Court. (R. 13–14.)

SUMMARY OF ARGUMENT

This Court has reviewed the decision of the Tax Court in this case. The case was remanded to the Tax Court for modification as to two matters. The Tax Court followed the mandate of this Court and accordingly modified its decision as to the two matters.

Taxpayer had entered into an agreed computation of tax under Tax Court Rule 50 upon which the initial decision of the Tax Court was based. However subsequent to the remand of the case by this Court, taxpayer again submitted Rule 50 computations in which he raised new issues inconsistent with the opinion of this Court. The Tax Court properly did not accept taxpayer's computations raising new issues, but instead correctly followed the mandate of this Court and modified its prior computations directly in accordance with the two matters as ordered by this Court.

Furthermore, in addition to taxpayer's argument being improper it is without substance. The cases upon which he relies are authority for an entirely different proposition than what taxpayer asserts. Taxpayer's argument indicates his misapprehension as to the mathematical computations utilized in a net worth method of reconstructing income.

ARGUMENT

The Tax Court correctly modified its decision in accordance with the judgment and mandate of this Court

The Tax Court filed its opinion in this case on April 30, 1956. *Romm* v. *Commissioner* (1956 P. H. T. C. Memorandum Decisions, par. 56, 104). Under

Tax Court Rule 50, *supra,* the parties agreed as to computation for entry of decision on July 24, 1956, and on July 26, 1956, decision was entered. On October 22, 1956, taxpayer petitioned this Court for review of the Tax Court decision (Appendix, *infra.*) This Court decided the case on May 27, 1957, affirming the court below with the exception of two matters as to which the Tax Court decision was to be modified. *Romm* v. *Commissioner,* 245 F. 2d 730 (C. A. 4th), certiorari denied, 355 U. S. 862. This Court issued its mandate to the Tax Court on June 29, 1957 remanding the case to that court for further proceedings not inconsistent with the opinion of this Court. (R. 1.) Accordingly, the Tax Court entered an order and decision on December 17, 1957.

In the mandate proceeding before the Tax Court and in his instant brief, taxpayer urges that for each taxable year his income tax deficiencies, fraud penalties, and statutory interest thereon become a liability to be reflected in taxpayer's net worth thereby, reducing the tax liability for each respective succeeding year. (Br. 7–11.) The Tax Court answered taxpayer's claim by stating that he was requesting a new Tax Court Rule 50 computation based on an argument that raises new issues. (R. 12.) It is a well-founded principle that the only issues that may be raised on a hearing under Rule 50 are those that are strictly confined to the correct computation of the deficiency resulting from the decision and no new issues may be raised. Tax Court Rule 50 (*e*); *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308; *Commissioner* v. *Superior*

Yarn Mills, 228 F. 2d 736 (C. A. 4th); *Shanis* v. *Commissioner*, 213 F. 2d 151 (C. A. 3d); *Fifth Street Building* v. *Commissioner*, 77 F. 2d 605 (C. A. 9th); *Davison* v. *Commissioner*, 60 F. 2d 50 (C. A. 2d). Certainly the matter taxpayer now introduces is a new matter relating to the net worth computations that determined taxpayer's deficiency. Furthermore, taxpayer has already entered into an agreed computation of his tax. The Tax Court decision entered July 26, 1956, was in conformity with this agreed computation provided in Rule 50.

As the Tax Court stated the proceeding here involves computing the tax liability of the taxpayer in accordance with the mandate of this Court that modified the Tax Court decision as to two matters. (R. 12.) The decision of this Court reviewed all matters appealed by the taxpayer from the Tax Court decision and in accordance with Section 7482 (c) (1) of the 1954 Internal Revenue Code, *supra*, remanded this case for modification as to the two specific matters. *Romm* v. *Commissioner*, *supra*, p. 736. Indeed in its opinion (p. 732) this Court set forth precisely the amount of tax and additions to tax determined by the Tax Court for each year involved and affirmed except as to these minor matters. The mandate of this Court ordered the decision of the Tax Court to be modified in accordance with the opinion of this Court. That is exactly what the Tax Court did. It recomputed taxpayer's liability modifying only as to the two matters ordered by this Court. A lower court is without au-

thority to pass upon new matters [2] but must confine itself to the directions ordered in the mandate. *Peavy-Byrnes Lumber Co.* v. *Commissioner*, 86 F. 2d 234 (C. A. 5th), *Helvering* v. *Kendrick Coal & Dock Co.*, 72 F. 2d 330 (C. A. 8th).

Furthermore, the issue taxpayer is improperly presenting is without substance. The cases relied upon by taxpayer do not hold that the deficiency, fraud penalty, and interest thereon are to be deducted from taxpayer's net worth when employment of increase in net worth, as here, demonstrates that these deficiencies and additions to the tax are owing, and never

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[2] Taxpayer contends that under Section 7481 (4) of the 1954 Code the first decision of the Tax Court was "stripped * * * of its finality as though it had not been rendered". (Br. 5.) The above cited Code provisions relates only to rehearings ordered by the Court of Appeals. The Appellate Court may or may not remand a case for a new hearing. Section 7482 (c) (1), *supra*. It did not do so in the instant case, but affirmed in all except two minor respects.

[3] Taxpayer relies heavily upon *Polizzi* v. *Commissioner*, 247 F. 2d 875 (C. A. 6th). In that case the question as to whether taxpayer filed a joint or separate return was not considered by the Tax Court. The Court of Appeals stated that this matter could not be considered in the Rule 50 computation because it was a new matter; however, it should be considered under Tax Court Rule 19 providing for further hearings. The Court allowed taxpayer to file this motion out of time because the equities of the case required it, since in his deficiency notice the Commissioner had not asserted joint liability.

In the instant case the Rule 50 computation has been agreed upon by both parties, this Court has decided all matters raised by taxpayer's appeal and has ordered the prior decision of the Tax Court to be modified in only two respects. This Court did not deem it necessary to have a further hearing on any matters. The *Polizzi* case, *supra*, is not in any way in point here.

have been paid. The cases and revenue rulings relied upon by taxpayer are authority for a very different proposition, namely, that in determining a corporation's earnings and profits for the purpose of deciding the nature of the distributions (dividend or capital) to a corporate shareholder, income tax deficiencies together with the interest and penalties thereon are to be deducted from earnings and profits. *Drybrough* v. *Commissioner*, 238 F. 2d 735 (C. A. 6th); *Stein* v. *Commissioner* 25 T. C. 940, acq. 1957 Int. Rev. Bull. 29–7; *Stern Brothers & Co.* v. *Commissioner*, 16 T. C. 295, acq. 1951–2 CB 4; *Stark* v. *Commissioner*, 29 T. C. No. 17; Rev. Rul. 107, 1953–1 Cum. Bull. 178; Rev. Rul. 57–332, 1957–29 Int. Rev. Bull. 8. This is an entirely different proposition than the one taxpayer attempts to assert. Taxpayer surely can not claim in reduction of his assets and thus of his net worth for the taxable years amounts of federal taxes and penalties which he not only did not pay during these years, but liability for which he failed to admit, but contested throughout.

As a matter of fact, if taxpayer had paid the taxes and penalties in dispute during the taxable years, they would have constituted additions to his net worth. As the Supreme Court explained the net worth method in *Holland* v. *United States*, 348 U. S. 121, 125:

> The taxpayer's non-deductible expenditures, including living expenses, are *added* to these increases, [the adjusted net values of taxpayer's assets at the beginning and end of each of the years involved] and if the resulting figure for any year is substantially greater than the

> taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income [emphasis ~~and parenthesis~~ added].

Surely federal income taxes are non-deductible expenditures under the Internal Revenue Code Section 23 (c) (1) (a) of the 1939 Code, *supra* (now Section 164 (b) (1) of the 1954 Code.) Clearly federal income taxes, a non-deductible expenditure, is added to, not deducted from, net worth increases for purpose of determining a deficiency when the net worth method is utilized.

CONCLUSION

The order and decision of the Tax Court was in conformity with the mandate of this Court and should be affirmed.

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MARCH 1958.

APPENDIX

Docket No. 55682

APPEARANCES:

Joseph N. Romm and Helen K. Romm, Husband and Wife, Petitioners. For petitioners: Warren W. Grimes, Esq., P. Bateman Ennis, Esq., Frank A. Spicer, C.P.A. *vs.* Commissioner of Internal Revenue, Respondent. For respondent: William Schwerdtfeger, Esq.

Docket Entries

1954

Dec. 22—Petition received and filed. Taxpayer notified. Fee paid. 1 copy rec'd.

Dec. 27—Copy of petition served on General Counsel.

Dec. 22—Notice of appearance of Warren W. Grimes, Frank A. Spicer, as counsel filed. 2 copies rec'd Copies served 12/27/54.

Dec. 22—Request for Circuit hearing in Washington, D. C. filed by taxpayer. Granted 1/4/55.

1955

Jan. 26—Appearance of P. Bateman Ennis as counsel filed.

Jan. 28—Answer filed by General Counsel.

Feb. 1—Copy of answer served on taxpayer, Washington, D. C.

Feb. 9—Reply to answer filed by taxpayer. Copy served.

1955—Continued

Aug. 16—Hearing set December 5, 1955, Washington, D. C.

Sept. 12—Motion for further and better statement filed by taxpayer. Served.

Sept. 13—Hearing set 10/19/55 on petitioner's motion. Copy served.

Sept. 20—Motion to withdraw motion for further and better statement filed by petitioner. 9/23/55 granted.

Sept. 26—Motion to amend petition, amended petition lodged, filed by petitioner.

Sept. 27—Motion to amend petition granted, amended petition filed.

Sept. 28—Copy of motion and amended petition served on General Counsel.

Oct. 11—Answer to amended petition filed by General Counsel. 10/12/55 copy served.

Oct. 18—Reply to answer to amended petition filed by petitioner. 10/19/55 copy served.

Dec. 12—Hearing had before Judge Mulroney on merits. Stipulation of Facts with exhibits 1 thru 8 and A thru J filed. Briefs Jan. 26, 1956; replies Feb. 27, 1956.

Dec. 23—Transcript of Hearing 12/12/55 filed.

1956

Jan. 25—Brief filed by taxpayer. 1/27/56 copy served.

Jan. 26—Brief filed by respondent. Served 1/27/56.

Feb. 24—Reply Brief filed by taxpayer. Served 2/27/56.

Feb. 27—Reply Brief filed by Respondent. Served 2/28/56.

1956—Continued

Apr. 30—Memorandum findings of Fact and Opinion filed. Mulroney J. Decision will be entered under Rule 50. Served 4/30/56.

Jul. 24—Agreed computation for Entry of Decision filed.

Jul. 26—Decision entered, Judge Johnson, Div. 10. Served 7/27/56.

Aug. 8—Order Fixing Amount of Bond at $106,000.00, entered. Served 8/10/56.

Oct. 22—Petition for review by U. S. Court of Appeals, Fourth Circuit, filed by petitioner.

Oct. 22—Proof of service filed.

Nov. 21—Statement of Appellants Points, with proof of service thereon, filed.

Nov. 21—Designation of Contents of Record on Review, with proof of service thereon, filed.

Nov. 23—Order extending time for filing record on review and docketing petition for review to 1/20/57 entered. Served 11/26/56.

Dec. 27—Transcript of record in duplicate sent to U. S. C. A. 4th, Circuit.

1957

Jul. 1—Mandate from U. S. Circuit Court of Appeals, 4th Circuit modifying Tax Court's decision and remanding to Court for further proceedings filed.

Jul. 3—Order that proceeding is placed on the Motions Calendar, Aug. 21, 1957 for consideration of any recomputation, stipulation or motion which may be filed on or before Aug. 14, 1957, entered. Served 7/8/57.

Aug. 13—Motion to strike case from the 8/21/57 motions calendar, filed by Petr. granted 8/14/57.

1957—Continued

Aug. 15—Motion of Aug. 13 served.

Oct. 31—Motion by respdt. for entry of decision. (Helen K. Romm)

Oct. 31—Motion by respdt. for entry of decision. (Joseph N. Romm)

Nov. 4—Decision entered, Judge Mulroney. served 11/6/57.

Nov. 20—Petr's motion for entry of decision with computation attached. served 11/21/57.

Nov. 20—Motion by petr. for stay, hearing, reconsideration and leave to file under Rule 50.

Nov. 20—Order that petrs. motion for entry of decision, with computation attached, be filed this date, and that hearing on motions for entry of decision is set Dec. 11, 1957, at Wash., D. C. served 11/21/57.

Dec. 11—Hearing on motions for entry of decision. Referred Judge Mulroney.

Dec. 17—Order and decision entered, Judge Mulroney.

1958

Jan. 15—Pet. for review with proof of service thereon, filed by Petr. U. S. C. A. 4th.

Jan. 28—Statement of Points with proof of service thereon, filed.

Jan. 28—Designation of contents of record on review, with proof of service thereon, filed.

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